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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

DATE: **AUG 08 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reconsider the decision, which the director dismissed. The director also dismissed a second motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner, a public school board, seeks to employ the beneficiary as a school psychologist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of previously submitted materials.

The petitioner filed the Form I-140 petition on November 15, 2010. The director denied the petition on July 25, 2011 and allowed the petitioner 30 days to file an appeal or a motion to reopen and/or reconsider the decision. The 30-day filing deadline derives from the U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.3(a)(2)(i) for appeals, and 8 C.F.R. § 103.5(a)(1)(i) for motions.

On August 29, 2011, the director received the petitioner's motion to reconsider the decision. The director dismissed the motion as untimely on September 30, 2011, because the petitioner did not file the motion within 30 days after the date of the decision.

The petitioner filed a second motion to reconsider on October 21, 2011. Counsel contended that the first motion was in fact timely, and the director should have considered the merits of the first motion. The AAO agrees with counsel on this point. Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. 8 C.F.R. § 103.8(b). By this formula, the motion was due no later than August 27, 2011. August 27, 2011, however, fell on a Saturday. August 29, 2011 was the following Monday. Under the USCIS regulation at 8 C.F.R. § 1.2, when the last day of a specified period for taking an action falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

The director dismissed the second motion on December 5, 2011. The director repeated the erroneous conclusion that the first motion was untimely. Following a cursory discussion of the merits of the petitioner's claims, the director reaffirmed the conclusion that the petitioner had not established eligibility for the national interest waiver.

The petitioner filed a timely and substantive appeal on January 5, 2012. To remedy the errors in the director's two decisions on motion, the AAO will give full consideration to the merits of the petition and supporting evidence.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

(A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective

assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term “prospective” is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner’s initial submission indicated that the beneficiary had worked for the petitioner as a school psychologist since 2004. The beneficiary’s earlier experience included practice in a range of settings, including schools, clinics and private practice. Counsel stated:

On first impression, it would appear that a school psychologist would not qualify for a National Interest Waiver because they are not in great demand: indeed there may be an abundant number of school psychologists available. . . . Moreover, school psychologists may be considered to hav[e] only a marginal impact on the national interest. . . .

[N]onetheless, counsel believes that this case is truly unique and should not be limited to testing the labor market through labor certification. For one, [the beneficiary] is not being considered merely as a school psychologist, but rather for her past performance and twenty years experience in crisis intervention, both in the United States and the British West Indies. Her extensive and most impressive CV, including her training and experience attest that she is unique in crisis intervention. She received the highest medal and award from the Queen[']s Government in Montserrat for her exceptional work in organizing, coordinating and implementing programs during recent volcanic eruptions and devastating hurricanes on that island. . . . [The beneficiary] has published extensively through numerous papers and books on mental health problems brought on by chaotic conditions which impacted on churches and communities through various outreach programs.

Since working in the US for the past five years, [the beneficiary] has received recognition and certification from the New Jersey State Department of Mental Health for her continuing work as a first responder. Under this program, relatively new and as the result of 9/11 disaster, [the beneficiary] has been awarded full certification to continue her specialized work in crisis intervention. Note that this expertise in crisis intervention is not a standard job description for school psychologist[s] but applicable only to a limited number of first responders who are expert in crisis intervention.

Counsel’s phrase “certification from the New Jersey State Department of Mental Health” appears to refer to certification in Disaster Response Crisis Counseling (DRCC). The initial submission included no documentary evidence that the beneficiary held DRCC certification at the time of filing the petition. Some witnesses quoted in the record indicate that the beneficiary held that certification, but others, including the

beneficiary herself, state only that the beneficiary had completed the necessary training requirements for that certificate. None of the witnesses who stated that the beneficiary already held the certification were employed by the certifying agency, and therefore they were not in a position to make claims on behalf of that agency. An August 30, 2010 letter from [REDACTED] director of Training and Information Services for the Mental Health Association in New Jersey, Inc., indicated that the beneficiary “is scheduled next week to be fingerprinted for this certification,” after which “we expect that she will be awarded the NJDRCC certificate, barring any unforeseen result.” This letter dates from several months prior to the filing date, but the initial submission included no documentation of the certification itself.

With respect to the beneficiary’s publication history, the beneficiary’s *curriculum vitae* (CV) does not show any published work on crisis intervention since 2003, and all of her published crisis-related work since 1998 has dealt specifically with volcanic activity in Montserrat. The record does not establish a high risk of volcanic activity in West Orange, New Jersey. The beneficiary’s CV includes the following descriptions of her four most recent “publications”:

2004 – [REDACTED]

2006 – [REDACTED]

2007 – [REDACTED]

2009 – [REDACTED]

It is not clear how many of the above four claimed “publications” have actually been “published” in the usual sense of that term. The record does not indicate that a primary function of the beneficiary’s intended position as a school psychologist has involved, or will involve, preparing new research or other material for widespread publication (as opposed to distribution within a single school district).

Counsel stated: “By counseling and treating children and families under severe stress from both natural calamities and man-made terrorist acts, [the beneficiary] is rendering work which is clearly beneficial to our economic interests and social fabric by, for one, helping to reduce drop-out rates in schools.” Counsel cited no statistical evidence to show that “natural calamities and man-made terrorist acts” were significant causes of “drop-out rates in schools” until the beneficiary’s arrival reversed that trend. Without such evidence, counsel’s assertion is little more than speculation.

The initial submission included numerous witness letters, some prepared for the petition in 2010, and others from 2003. Many of the witnesses claimed no training in psychology; they include church officials, a head and neck surgeon and an obstetrician/gynecologist. Overall, the witnesses praised the beneficiary’s training, experience and dedication in fairly general terms. One witness, [REDACTED] (who studied alongside

the beneficiary at Rutgers University), claimed that the petitioner was, "for many years . . . the only psychologist" in Montserrat, but the record does not otherwise support this claim.

the petitioner's director of Student Support Services, offered the most thorough description of the beneficiary's work for the petitioner:

[The beneficiary], an exceptionally gifted child psychologist, has been employed with our Board for the past six years . . . working with students, ages 3-21 years old, upon referral for evaluation, crisis intervention and counseling. During that time she has introduced and implemented a number of plans and activities which makes her an invaluable individual whose continued employment would undoubtedly be in the national interest of the United States. Permit me to explain.

The need for [the beneficiary's] services as a school psychologist to work with students in the elementary and middle schools in our district is invaluable. She reviews students' assessments and develops individual plans; prepares crisis intervention plans and resolves students' learning and behavior problems. She also works directly with child study teams, teachers, and school personnel to improve classroom management strategies. She further counsels with parents and students to improve teaching and learning methods and techniques for our special needs children including the gifted and talented students.

[The beneficiary's] expertise in crisis intervention is well known to our district. Many times, as Director, I call upon her assistance with many critical incidents. Not only does [the beneficiary] serve our district in this capacity, but she also trains other child study team members in this particular skill. She has become an outstanding resource to this department regarding her crisis intervention experience.

Her C.V. (annexed hereto) is most impressive having over 20 years experience as a certified psychologist in both the United States and British West Indies. She has published papers on child psychology, chaired consultancies in such diverse subjects as drug prevention, school management and self-esteem promotion; served as visiting lecturer at the American University of the Caribbean Medical School; provided training and coordinating of crisis intervention programs sponsored by the International Red Cross-Montserrat branch; and developing a project and writing the story of volcanic activity on the island of Montserrat. . .

[The beneficiary's] exceptional ability in crisis intervention makes her continued employment crucial to our school district. For people in the throes of a disaster where life is often chaotic and difficult, it is essential to have a seasoned crisis intervention specialist with many years experience, be part of any team of first responders.

A number of witnesses praised the beneficiary's crisis intervention efforts in Montserrat, particularly after volcanic eruptions began to devastate that island in 1995. , identified above, stated that the petitioner "published a children's book . . . to help the children of Montserrat understand the traumatic effect of the volcano and to teach effective coping skills."

[REDACTED], chairman of the Department of Applied Psychology at Rutgers University, stated that the beneficiary's volunteer work in Montserrat earned her "the Peterson Prize, an honor that is bestowed on psychologists who have made an outstanding contribution to their community and profession." The record indicates that the Rutgers Graduate School of Applied and Professional Psychology (GSAPP) awards the Peterson Prize annually to "[a] GSAPP graduate who 'through a sustained career in psychology has contributed at the highest level of distinction to the public good.'" Materials indicate that the beneficiary received the prize "for her outstanding contributions as a pioneer professional psychologist in the British West Indies (BWI) and British Virgin Islands (BVI), where she has often been the first psychologist with a doctoral degree." The record does not indicate that the state of psychology in the BWI and BVI in the 1980s and 1990s resemble that in New Jersey today, or that the beneficiary's contributions in the Caribbean imply similar contributions for the petitioner.

[REDACTED] also stated that the beneficiary "completed all requirements for the school psychology certificate in New Jersey. . . . She cannot, however, be employed as a school psychologist unless she is a registered resident in New Jersey. [The beneficiary] is applying for residency." This indication that the beneficiary "cannot . . . be employed as a school psychologist" in New Jersey is not consistent with repeated assertions by both the petitioner and the beneficiary that the beneficiary has indeed held that position, with that title, for several years.

[REDACTED] stated that the beneficiary's "work is well known and greatly respected by some governments in Caribbean where she has been contracted to work as a consultant. She is recognized as one of the leading Applied Psychologists of the Leeward Islands." The petitioner, however, has predicated the waiver claim on the beneficiary's intended employment as a school psychologist. In this respect, Prof. Irish claimed that the beneficiary's "work with [the petitioner] in recent years is highly acclaimed because of the success of her work with diverse ethnic populations and people of different nationalities." This assertion that the beneficiary's "work . . . is highly acclaimed" is not, itself, evidence of that acclaim.

Apart from the beneficiary's post-eruption efforts in Montserrat and her church activities, neither of which fall under the purview of her professional work in the United States, the witness letters depict the beneficiary as a competent and diligent professional. The letters do not, however, explain how her ongoing work for the petitioner has significant impact beyond the West Orange School District. Rather, the emphasis is on her local impact. West Orange [REDACTED] for instance, stated that the beneficiary "has been instrumental in developing programs for our community's families and students . . . , and she has demonstrated her value in ways that have helped countless students and families in West Orange."

Witnesses provided details about the beneficiary's work in the small, volcanic island of Montserrat in the hurricane-prone Caribbean. In contrast, they provided little information about the petitioner's crisis intervention work in New Jersey, except to say that her training has prepared her well for such work should it become necessary.

On May 14, 2011, the director issued a request for evidence (RFE), instructing the petitioner to establish that the benefit from the beneficiary's work will be national in scope, and that the labor certification process would be adverse to the national interest in this instance. The director also requested further information about the exact nature of the beneficiary's role in her field, and instructed the petitioner to support the previous assertion that the beneficiary's "work . . . is highly acclaimed."

In response, counsel stated:

The petition, although relating to a school psychologist, is seeking a national interest waiver in an area far and above that of school psychologist as defined in the Dictionary of Occupational Titles. It encompasses an individual who, through her experience and crucial work in crisis intervention, would serve to benefit the national interest of the United States. Examples were cited and documented in the prior submission, including [the beneficiary's] work covering volcanic eruptions and hurricane devastation and most recently, the utter destruction through flooding in the Mississippi Valley and severe tornados in Alabama, Oklahoma and especially Missouri (Joplin) [sic], as witnessed on TV, shows total destruction of lives and homes, leaving survivors in most dire need of assistance.

Counsel's wording implies that information about the flooding and tornadoes in the Southeastern and Midwestern United States was among the "[e]xamples . . . cited and documented in the prior submission." The events described, however, occurred in April and May of 2011, several months after the filing of the petition and, in some instances, after the director issued the RFE. It is not clear why counsel cited these then-recent events. The director did not suggest that natural disasters are unknown or rare in the United States, and therefore it is not necessary to show that they take place.

The petitioner submitted a copy of the beneficiary's DRCC certificate, showing an issue date of December 12, 2010. Therefore, the beneficiary was not, in fact, "certified by the State of New Jersey Department of Human Services" at the time the petitioner filed the petition. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Counsel asserted that the beneficiary, "[a]s a first responder recognized and certified by the State of New Jersey Department of Human Services, is uniquely qualified to lend assistance where national disasters have been declared." Counsel emphasized this claim, stating: "The Joplin disaster is a case in point. . . . [F]irst responders have traveled from many states in the nation . . . to lend immediate assistance. [The beneficiary], who recently has been certified, would therefore also be eligible to render valuable assistance." Counsel did not claim, and the record does not show, that the beneficiary actually rendered assistance after the Joplin tornado, or that anyone had attempted to enlist her services (or those of anyone who held New Jersey DRCC certification) for that purpose. Counsel claimed only that the beneficiary's experience and training "would" have been useful in the aftermath of the disaster.

Counsel asserted: "There is no claim being made that there is a shortage of U.S. workers under the title of School Psychologist." Counsel had previously acknowledged that, generally, "a school psychologist would not qualify for a National Interest Waiver," and that "there may be an abundant number of school psychologists available," which would reduce the chances that the Department of Labor would approve a labor certification on the beneficiary's behalf. The waiver request, therefore, emphasizes activities beyond and separate from those of a school psychologist, even though that is the beneficiary's job title.

Furthermore, the petitioner seeks an employment-based immigrant classification for the beneficiary. The waiver, therefore, must derive from her employment activities. The petitioner has not shown that crisis

counseling has or will constitute a significant element of the beneficiary's routine job duties. Instead, the petition and waiver application appear to rest on the assertion that, although the beneficiary would primarily work as a school psychologist, it is in the national interest to have her on hand as a crisis counselor in case disaster strikes. The waiver claim, therefore, rests on speculation.

Counsel quoted [REDACTED] previously submitted letter to support the assertion that, given the beneficiary's "exceptional ability in crisis intervention," "it would be contrary and counterproductive to the national interest to deprive the employer of [the beneficiary's] exceptional ability." As noted previously, the plain wording of the statute makes it clear that exceptional ability is not, on its face, grounds for a national interest waiver. Rather, exceptional ability is an element of an employment-based immigrant classification that typically includes a job offer requirement.

Most of the exhibits submitted in response to the RFE are copies of previously submitted materials. The exceptions are the beneficiary's DRCC certificate, discussed above, and a letter from [REDACTED] letter is dated November 17, 2010, just after the petition's filing date.

[REDACTED] stated: "While many psychologists may have experience in trauma and crisis intervention with adults, very few have this background with children. . . . [I]t is critical that we recruit and encourage people with this expertise to come to the United States to live and work." [REDACTED] stated that he supports the waiver application "in order that [the beneficiary] may continue to perform valuable work in our state, particularly in the area of crisis intervention." This wording implies that the beneficiary had already performed such work in New Jersey, but [REDACTED] did not elaborate or provide any examples. The reference to crisis intervention "in our state" did not indicate any expectation that the beneficiary would perform such work elsewhere.

In the July 25, 2011 denial notice, the director acknowledged that the petitioner submitted "generalized letters of recommendation," but found that the petitioner had not submitted "corroborative primary evidence . . . specifying the direct role the beneficiary has played in the field." Noting that the petitioner would employ the beneficiary primarily as a school psychologist, the director found that the petitioner had not established that the benefit from the beneficiary's employment in that occupation would have national scope.

The petitioner's first motion included copies of the beneficiary's written work, mostly produced for Montserrat, and copies of previously submitted witness letters. Counsel contested the director's finding that the witness letters were general and uncorroborated. To support this claim, counsel quoted from several witness letters. Some of the quoted letters were, in fact, general in nature. Others focused on the beneficiary's work in Montserrat or with her church, neither of which address how her present work as a school psychologist for the petitioner warrants a national interest waiver. Witnesses discussed recognition that the beneficiary received as a graduate student or while working in Montserrat. The record, however, is devoid of evidence that such recognition has continued in the beneficiary's current position.

Counsel pointed to the beneficiary's annual performance review, conducted by the petitioner in March 2011. While favorable, the review mentions the beneficiary's crisis counseling work only in the context of a list of training courses that the beneficiary has taken "[i]n an effort to keep current with the best practices in the field and to improve her performance." The review, thus, reinforces the conclusion that the beneficiary seeks

to enter the United States first and foremost as a school psychologist, and that the waiver claim rests heavily on the uncertain possibility that she may put her crisis counseling skills to use.

The petitioner's second motion, and the director's December 2011 dismissal of that motion, concerned procedural issues that require no further discussion here. On appeal from the director's latest decision, the petitioner submits still more copies of materials that, in some cases, the petitioner had already submitted three times before (with the initial submission, the response to the RFE, and in the first motion). Some of these exhibits appear more than once in the appeal itself, because the petitioner resubmits copies of both the RFE response and the exhibits that accompanied the first motion.

Counsel repeats the claim that the beneficiary's "training and experience in crisis intervention is unique and led to her acclaim in the U.S. and the British West Indies." With respect to the beneficiary's work in the BWI, the petitioner has repeatedly indicated that Montserrat and other islands in the BWI lacked significant psychological infrastructure during the beneficiary's time there, whereas, in contrast, existing facilities in New Jersey include the graduate school where the beneficiary herself received much of her advanced training. Given the demonstrably different conditions between the United States and the BWI, there is little cause to believe that her future impact in one will closely resemble her past achievements in the other.

The record does not credibly document "acclaim in the U.S." The record indicates that local authorities consider the beneficiary to be a well-qualified school psychologist whose crisis intervention training would be a useful asset in the uncertain event that her services in that area would become necessary in the local area. It is clear from the record that the beneficiary is first and foremost a school psychologist and, in the United States at least, her crisis intervention expertise is a contingency, albeit one that several witnesses value highly. The claim essentially boils down to the assertion that the beneficiary's day-to-day functions lack national scope and do not warrant a national interest waiver, but it is crucial that she be available in the event of an unforeseeable emergency. Eligibility for the national interest waiver rests on a showing that the alien will serve the national interest, not on speculation that, under certain conditions, she might do so.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.